Constitutional challenges to select federal firearms statutes after *Bruen*

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Agenda

- *"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."*
- U.S. Const. Amend. II

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Agenda

- Predecessors to *Bruen*: *District of Columbia v. Heller* and *McDonald v. Chicago*
- *Bruen's* Historical Analysis
- Cases denying challenges under *Bruen*
- Cases granting challenges under *Bruen*

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District of Columbia v. Heller, 554 U.S. 570 (2008)
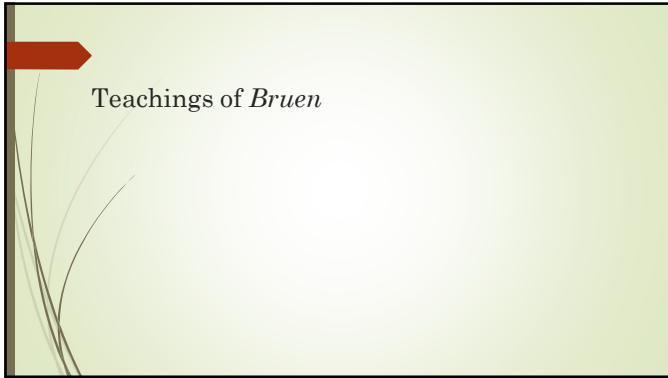
- "Right of the People"
- Members of political community

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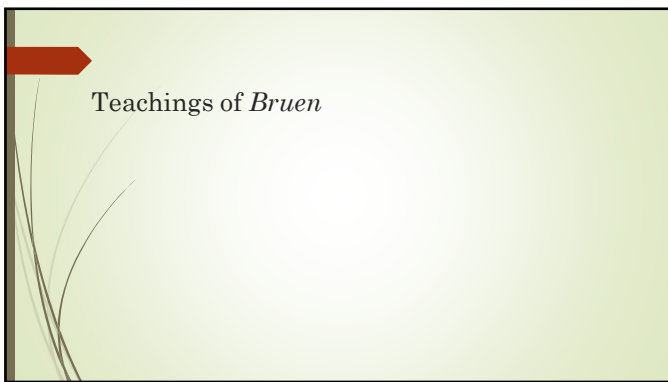*McDonald v. City of Chicago, Ill.,* 561 U.S. 742 (2010)

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New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. --- (2022).

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Teachings of *Bruen*
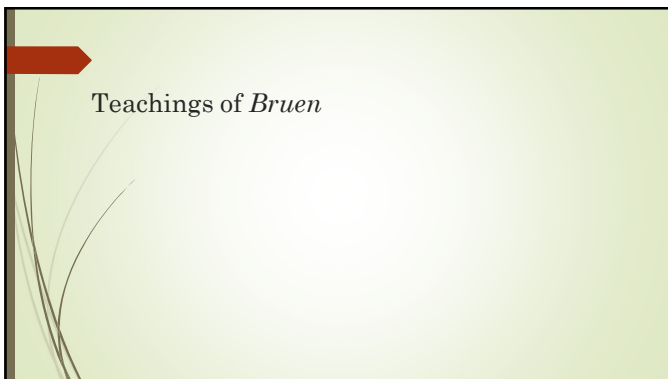
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Teachings of *Bruen*

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Teachings of *Bruen*

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Bruen court:

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Using *Bruen* to challenge criminal statutory prohibitions

- 922(g) – prohibited person in possession
- 922(g)(1) – felon
- 922(g)(2) – fugitive
- 922(g)(3) – unlawful user/addict
- 922(g)(4) – adjudicated a mental defective/committed
- 922(g)(5) – alien
- 922(g)(6) – dishonorable discharge

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Using Bruen to challenge criminal statutory prohibitions

- 922(g)(8) – subject to court order
- 922(g)(9) – convicted misdemeanor domestic violence
- 922(k) – altered/obliterated serial number
- 922(n) – under indictment
- 924(c) – in furtherance of narcotics trafficking, COV
- 924(j) – causes death during commission of 924(c)
- Other circumstances?

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Bruen threshold questions

- Facial vs. as applied challenge

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Bruen threshold questions

- "The people"
- Excludes non-law-abiding citizens?
- Some courts describe "virtuous" citizens
- Burden of proof

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§ 922(g)(1) challenges to date (felon in possession)

- 17 cases as of October 4
- None upheld the constitutional challenge based on *Bruen's* historical analysis
- One decision (*United States v. Trinidad*) where district court found gov't failed to provide sufficient historical data and directed further submissions
- Need to push on the Gov'ts burden

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§ 922(g)(1) challenges to date (felon in possession)

- *United States v. Ramos*, No. 21 Cr. 395 (C.D. Cal. 8/5/2022)

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Mississippi decisions

- *United States v. Randle*, No. 22-Cr-20 (S.D. Miss 9/6/2022) (922(g)(1) – felon in possession) (Judge Lee)
- *United States v. Cockerham, No* 21-Cr-0006 (S.D. MS. 9/13/2022) (922(g)(1) – felon in possession) (Judge Bramlette)
- *United States v. Daniels,* 2022 WL 2654232 (S.D. Miss 7/8/2022) (922(g)(3) – unlawful user) (Judge Guirola)

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Mississippi decisions on Second Amendment Challenge – 922(g)(1)

- *United States v. Randle*, No. 22-Cr-20 (S.D. Miss 9/6/2022) (Judge Lee) (denied Bruen challenge for reasons stated by the government in opposition):

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Mississippi decisions on Second Amendment Challenge – 922(g)(1)

- *United States v. Cockerham, No* 21-Cr-0006 (S.D. MS. 9/13/2022) (denies motion to dismiss challenge under *Bruen*);

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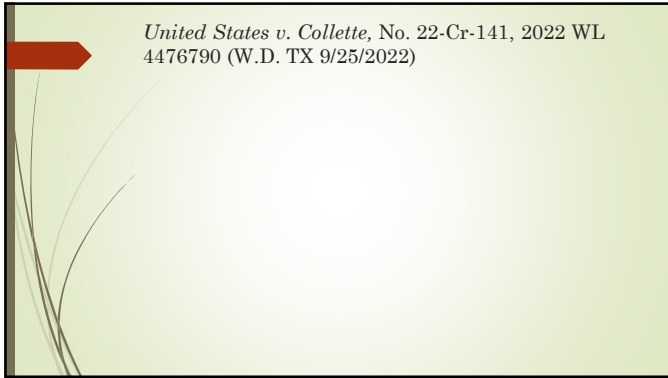**Facial and "as applied" challenge: "the people"**

- *United States v. Coombes*, No. 22-Cr-189, 2022 WL 4367056 (N.D. Okla. 9/21/2022)

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§ 922(g)(1) challenges to date (felon in possession)

- *United States v. Collette*, No. 22-Cr-141, 2022 WL 4476790 (W.D. TX 9/25/2022)

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United States v. Collette, No. 22-Cr-141, 2022 WL 4476790 (W.D. TX 9/25/2022)

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United States v. Collette, No. 22-141, 2022 WL 4476790 (W.D. TX 9/25/2022)

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United States v. Collette, No. 22-141, 2022 WL 4476790 (W.D. TX 9/25/2022)

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§ 922(g)(3) (unlawful user in possession)

- 2 *Bruen* challenges
- Both rejected the constitutional challenge based on *Bruen's* historical analysis

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Bruen Second Amendment challenge – 922(g)(3) (unlawful user or addicted in possession)

- United States v. Daniels, 2022 WL 2654232 (S.D. Miss 7/8/2022) (Judge Guirola)

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United States v. Daniels – historical analysis

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922(g)(3) – unlawful drug user/addicted

- *United States v. Seiwert*, No. 20-443 (N.D.IL, 9/28/2022)

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Constitutional challenge to 922(g)(3): void for vagueness

- *United States v. Morales-Lopez*, 20-Cr-0027 (D. Utah 6/30/2022) (922(g)(3))

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Second Amendment challenge – 922(g)(8) (firearm possession while subject protective order)

- Only one case -- Denied challenge under *Bruen*

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Second Amendment challenge – 922(g)(8) (firearm possession while subject protective order) and 922(n) (person under indictment)

➤ *United States v. Kays*, 2022 WL 3718519 (W.D. Okla. 8/29/2022)

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Second Amendment challenge – 922(g)(9) (firearm possession after conviction of misdemeanor domestic violence offense)

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Second Amendment challenge – 922(g)(9) (firearm possession after conviction of misdemeanor domestic violence offense)

➤ *United States v. Jackson*, 2022 WL 3582504 (W.D. Okla. 8/19/2022)

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Second Amendment challenge – 922(g)(9) (firearm possession after conviction of misdemeanor domestic violence offense)

- *United States v. Nutter*, 21-Cr-00142 (S.D. W.Va 8/29/2022)

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Second Amendment challenge – 922(g)(9) (firearm possession after conviction of misdemeanor domestic violence offense)

- *United States v. Doty*, No. 21 Cr 21 (N.D.W. Va. 9/9/2022)

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Second Amendment challenge – 922(k) (altered/obliterated serial number)

- *United States v. Price*, No. 22-Cr-00097 (S.D. W.Va. 10/12/2022)

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Second Amendment challenge – 922(n) (person under indictment)

- *United States v. Kays*, 2022 WL 3718519 (W.D. OK 8/29/2022)

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Second Amendment challenge – (922(n)) (possession while under indictment)

- *United States v. Quiroz*, No. 22-Cr-00104 (W.D. TX., 9/19/2022)
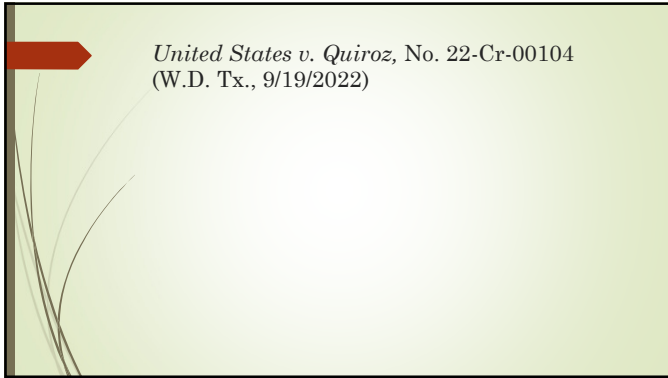- Plato's "allegory of the cave"

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United States v. Quiroz, No. 22-Cr-00104
(W.D. Tx., 9/19/2022)

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United States v. Quiroz, No. 22-Cr-00104
(W.D. Tx., 9/19/2022)

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United States v. Quiroz, No. 22-Cr-00104
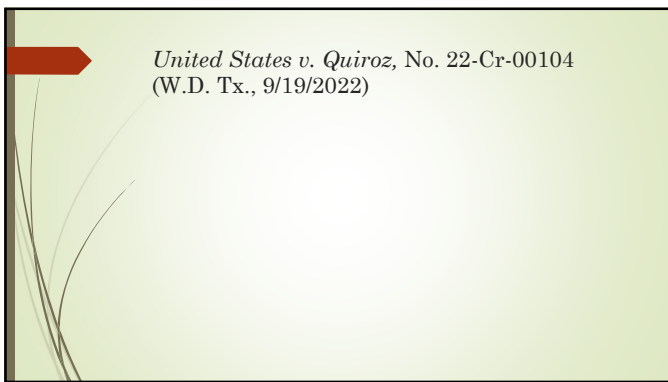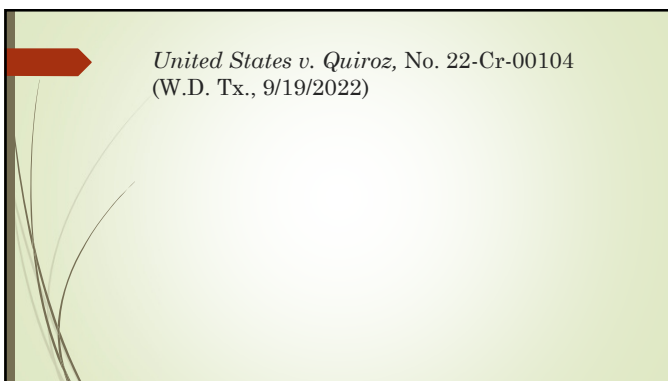(W.D. Tx., 9/19/2022)

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United States v. Quiroz, district court's historical analysis

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United States v. Quiroz, district court's historical analysis

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Quiroz Post-script:

- Government filed notice of appeal
  - Continued detention pending
  - Stay dismissal pending appeal
- D. Ct. denied both
- Criticized *Kay* opinion as "punting" on the constitutional question

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Second Amendment challenge to 924(c), 924(j)

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Second Amendment challenge to 924(c) /924(j) – during drug trafficking offense/crime resulting in murder

- United States v. Smith, No. 16-Cr-86 (D. Alaska, September 6, 2022) (post conviction opinion explaining pre-trial denying constitutional challenge based on *Bruen*)
- *United States v. Nevens*, No. 19-Cr-774 (C.D. Cal 8/15/2022 – Criminal Minutes) (denying motion to dismiss 922(g) and 924(c));
- *United States v. Ingram*, 2022 WL 3691350 (D. S.C. 8/25/2022) (Denies facial constitutional challenge to 922(g)(1) (felon in possession) and 924(c)).

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Second Amendment challenge to 924(c) /924(j) – during drug trafficking offense/crime resulting in murder
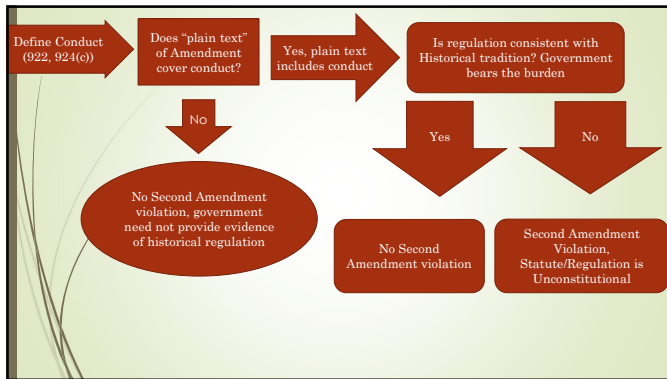
- *United States v. Smith*, No. 16-Cr-86 (D. Alaska, September 6, 2022) (post conviction opinion explaining pre-trial denying constitutional challenge based on *Bruen*)
- Second Amendment protections do not extend to unlawful use of firearm: furtherance of drug trafficking not a lawful purpose
- Reaffirms pre-*Bruen* decisions upholding federal statutes criminalizing use of firearms in connection with other crimes
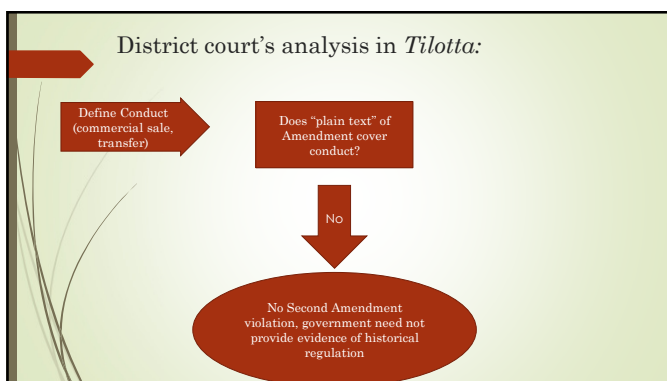
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Define Conduct (922, 924(c)) → **Does "plain text" of Amendment cover conduct?**

Yes, plain text includes conduct → **Is regulation consistent with Historical tradition? Government bears the burden**

No → **No Second Amendment violation, government need not provide evidence of historical regulation**

Yes → **No Second Amendment violation**

No → **Second Amendment Violation, Statute/Regulation is Unconstitutional**

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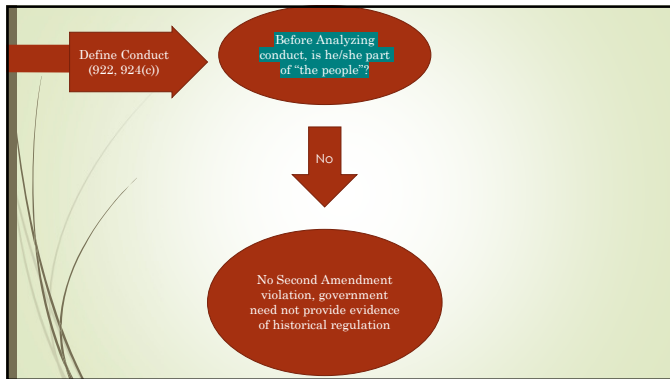*Second Amendment challenge – 922(a)(1)(A) (ATF regulations in transfer of weapons without a license)*

- *United States v. Tilotta*, 2022 WL3924282 (S.D. Cal 8/30/2022)

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District court's analysis in *Tilotta:*

Define Conduct (commercial sale, transfer) → **Does "plain text" of Amendment cover conduct?**

No → **No Second Amendment violation, government need not provide evidence of historical regulation**

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Define Conduct (922, 924(c))

Before Analyzing conduct, is he/she part of "the people"?

No

No Second Amendment violation, government need not provide evidence of historical regulation

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	Statutory Provisions	Constitutional Challenges in District Courts	Decisions/ Orders denying challenge	Decisions finding violation under Bruen	Decisions seeking more historical evidence	Decisions Upholding Other Constitutional Challenges
	Totals	35	33	2	1	1
	922(a)(1)(A)	1	1	0	0	0
	922(g)(1)	24	23	0	1	0
	922(g)(3)	3	2	0	0	1
	922(g)(8)	1	1	0	0	0
	922(g)(9)	3	3	0	0	0
	922(k)	1	0	1	0	0
	922(n)	2	1	1	0	0
	924(c)	3	3	0	0	0
	924(j)	1	1	0	0	0

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Takeaway on the constitutional challenges *Bruen*

- More historical evidence: *Trinidad* (D.PR) (922(g)(1))
- Unconstitutional under *Bruen: Quiroz* (W.D. TX) (922(n)) (Allegory of the cave)
- Unconstitutional under *Bruen: Price* (S.D. W.Va.) (922(k))
- Unconstitutionally vague: *Moralez-Lopez* (D. Utah) (922(g)(3))

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Challenge to bail condition under *Bruen*

- *United States v. Garcia*, No. 22-1581 (S.D. Cal. 9/18/2022) (facial/as applied challenge to bail condition in light of *Bruen)*

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Bruen challenge to USSG enhancements

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Second Amendment challenge –application of USSG 2D1.1(b)(1) enhancement

- *United States v. Alaniz*, No. 21-243 (D. Idaho 9/22/2022) (post-sentencing motion for release pending appeal) (memorandum opinion)

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Bruen as basis for 3582(c)(1)(A) – Compassionate Release

- *United States v. Daniels*, 2022 WL 5027574 (W.D.N.C. 10/4/2022)

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Circuit Court opinions

- *United States v. Gonzalez*, 2022 WL 4376074 (7th Cir. 9/22/2022)
- *Anders* brief

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The End.

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